UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

PLAZA MOTORS OF BROOKLYN, INC. d/b/a PLAZA HONDA d/b/a PLAZA AUTOMOTIVE, LTD. d/b/a PLAZA KIA, CRYSTAL BAY IMPORTS LTD. d/b/a ACURA OF BROOKLYNPLAZA OLDSMOBILE LTD. d/b/a PLAZA TOYOTA, PLAZA HYUNDAI, LTD. d/b/a PLAZA HYUNDAI, AND CRYSTAL MOTORS OF BAYSIDE, LTD. d/b/a PLAZA AUTOLEASING,

Plaintiffs,

vs.

GOVERNOR ANDREW M. CUOMO, Governor of the State of New York, in his official capacity,
BILL DE BLASIO, Mayor of the City of New York, in his official capacity, and
EMPIRE STATE DEVELOPMENT CORPORATION,
Defendants.

DECLARATION of HOWARD A. ZUCKER, M.D., J.D.

Case No. 20-cv-4851

Howard A. Zucker, M.D., J.D., on the date noted below and pursuant to § 1746 of title 28 of the United States Code, declares the following to be true and correct under penalty of perjury under the laws of the United States of America:

1) I am the Commissioner of the New York State Department of Health ("Department"). I make this declaration in my capacity as the Commissioner after consultation with Department program staff directing the initiatives detailed below. I respectfully submit this declaration in order to place before the Court certain testimony and documents relevant to the relief requested. I am familiar with the matters set forth herein, from professional knowledge, from

conversations with Department staff, or on the basis of documents that have been provided to and reviewed by me. I have been asked to assist New York State in its response to the COVID-19 public health emergency.

2) I have extensive knowledge of pediatric medicine and care and am aware of many family health issues. I am board certified in six specialties/subspecialties, and I have trained in pediatrics at Johns Hopkins Hospital, anesthesiology at the Hospital of the University of Pennsylvania, pediatric critical care medicine/pediatric anesthesiology at The Children's Hospital of Philadelphia, and pediatric cardiology at Children's Hospital Boston/Harvard Medical School. I was a professor of clinical anesthesiology at Albert Einstein College of Medicine of Yeshiva University and pediatric cardiac anesthesiologist at Montefiore Medical Center in the Bronx. I also served as associate professor of clinical pediatrics and anesthesiology at Columbia University College of Physicians & Surgeons and as pediatric director of the ICU at New York Presbyterian Hospital. I am a former Columbia University Pediatrics Teacher of the Year.

3) As Commissioner of the Department, I must "take cognizance of the interests of health and life of the people of the state, and of all matters pertaining thereto and exercise the functions, powers and duties of the department prescribed by law." Public Health Law ("PHL") § 206(1)(a).

4) I preside over the New York State's Office of Public Health, which includes epidemiology; the Medicaid program; the New York State Public Health and Health Planning Council; and the Wadsworth Center, New York's premier public health lab.

5) Since March of this year I have served as a member of the Governor Cuomo's COVID-19 Response and Recovery Task Force ("COVID-19 Task Force"). The Task Force is

responsible for spearheading the State's response to the COVID-19 public health emergency and brings together the Governor's Office, various State agencies, as well as international public health experts, to develop strategies and measures designed to fight the virus.

6) For the last nine months, I have been personally involved in the development and implementation of what is known as the "New York State on PAUSE" initiative—restrictions implemented through a series of executive orders ("EOs" and associated guidelines designed to stop the transmission of the novel coronavirus (COVID-19)—and I am also familiar with the detailed plan that the State adopted to allow the safe reopening of each New York industry, including all gatherings.

7) I make this declaration based upon, among other things, my personal knowledge, my studies and research on matters related to infectious diseases, and my work and discussions with other infectious disease experts and public health officials. I make this declaration to, among other things, further clarify the process and the creation, designation, and monitoring of the zones through the Governor's Cluster Action Initiative ("Initiative"), the tracking of the disease, and the State's response generally to this global pandemic.

8) I make this declaration in support of Defendants' Opposition to Plaintiffs' Motion for Preliminary Injunctive Relief.

COVID-19

9) On January 7, 2020, following an outbreak of pneumonia of unknown etiology in China's Wuhan Province, Chinese, authorities identified a novel coronavirus—COVID-19. Its spread around the world has been well documented. Exh. A.

10) COVID-19 is a highly infectious and potentially deadly respiratory disease caused

by a coronavirus that spreads easily from person-to-person. Exh. B.

11) Because there is no pre-existing immunity against this new virus, it has spread worldwide in an exceptionally short period of time, posing a "serious public health risk." Id.

12) On January 31, 2020, the World Health Organization ("WHO") declared a "public health emergency of international concern." Exh. C.

13) Less than two months later, on March 11, 2020, the World Health Organization declared COVID-19 a global pandemic. Exh. D.

14) On March 13, 2020, the President of the United States declared a national emergency. Exh. E.

15) "Transmission of SARS-CoV-2 [the virus that causes COVID-19] can occur through direct, indirect, or close contact with infected people through infected secretions such as saliva and respiratory secretions or their respiratory droplets, which are expelled when an infected person coughs, sneezes, talks or sings." Exh. F. "WHO, together with the scientific community, has been actively discussing and evaluating whether SARS-CoV-2 may also spread through aerosols in the absence of aerosol generating procedures, particularly in indoor settings with poor ventilation." Id. "Current evidence suggests that SARS-CoV-2 may remain viable for hours to days on surfaces made from a variety of materials." Exh. G.

16) COVID-19 has an incubation period of up to fourteen days. Exh. F. Many individuals infected with the COVID-19 virus are asymptomatic. Id.

17) The CDC has issued guidance recommending, among other things, that people comply with social distancing measures in order to prevent the spread of COVID-19. According to the CDC, "[l]imiting face-to-face contact with others is the best way to reduce the spread" of

COVID-19. Exh. H.

18) In order to limit exposure to COVID-19 and slow its spread, the CDC recommends keeping "at least six feet away from other people" and limiting "close contact with others outside your household in indoor and outdoor spaces" including avoiding groups and crowded places. Id. Social distancing "is one of the best tools we have to avoid being exposed to this virus and slowing its spread locally and across the country and world" because it "helps limit contact with infected people and contaminated surfaces." Id.

19) The rapid spread of COVID-19 in New York, in the United States, and worldwide, presented and continues to present a grave threat to New Yorkers and to New York's health care system. However, by taking strong action to ensure social distancing, as well as other important measures, New York has mitigated that threat. To avoid a devastating resurgence of COVID-19, responsible parties, business owners, and the public must continue to adhere to State and local rules and regulations.

20) At the end of September, we crossed the grim milestone of more than 1,000,000 deaths worldwide. As of October 19, 2020, 1,114,857 people have died worldwide;[1] 218,511 people have died of COVID-19 in the United States of COVID-19;[2] and 25,644 have died in the State of New York of COVID-19.[3]

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[1] Johns Hopkins Coronavirus Resource Center COVID-19 Dashboard: https://coronavirus.jhu.edu/map.html; see also WHO Coronavirus Disease (COVID-19) Dashboard found at https://covid19.who.int/ (last viewed October 19, 2020).

[2] CDC Covid Tracker found at https://www.cdc.gov/covid-data-tracker/index.html#cases (last viewed October 19, 2020).

[3] NYSDOH COVID-19 Tracker found at https://covid19tracker.health.ny.gov/views/NYS-COVID19-Tracker/NYSDOHCOVID-19Tracker-DailyTracker?%3Aembed=yes&%3Atoolbar=no&%3Atabs=n#/views (last viewed October 19, 2020).

COVID-19 Surges in New York State

21) New York recorded its first cases of COVID-19 on March 1, 2020, in New York City, and on March 2, 2020, in Westchester County.

22) On March 7, 2020, Governor Cuomo issued an Executive Order ("EO") declaring a State of Emergency and implemented the State Comprehensive Emergency Management Plan, which suspended all State and local laws, rules, and regulations to the extent necessary to address the COVID-19 emergency. See Executive Order 202, Exh. I,[4] available at https://www.governor.ny.gov/news/no-202-declaring-disaster-emergency-state-new-york. As of March 7, 2020, 60 people had tested positive for COVID-19 in the State of New York. See Fn. 3. Cases in the United States totaled 275. See Fn. 2. Cases worldwide totaled 179,111, with 7,426 deaths reported. See Fn. 1.

23) By March 20, 2020, the number of individuals testing positive for COVID-19 in New York approached 10,000, and deaths exceeded 150. See Fn. 3.

24) By April 20, 2020, over 267,000 individuals had tested positive for COVID-19, and over 13,000 people had died from COVID-19 in New York State. See Fn. 3. See also https://www.syracuse.com/coronavirus/2020/06/where-is-coronavirus-in-ny-see-map-charts-of-covid-19-cases-deaths-hospitalizations-sunday-june-14.html (includes similar charts with trends over time).

25) These events placed significant strain on New York State's healthcare system. For example, as the virus spread, New York faced a shortage of hospital beds, ventilators, and personal

[4] All of Governor Cuomo's Executive Orders can be found at https://www.governor.ny.gov/executiveorders.

protective equipment ("PPE"), such as masks and gloves.

26) As a result, alternate care sites were set up, including at the Javits Center in New York City. The United States Navy sent the U.S.N.S. Comfort, a Mercy-class hospital ship, to New York to assist with medical care.

27) Funeral homes were also overwhelmed, resulting in the use of mass graves to bury the dead.

28) At the worst stage of the pandemic, New York State had more coronavirus cases than any single country in the world.

29) Among other measures aimed at flattening the curve, slowing the spread of COVID-19, and preventing the health care system from becoming overburdened, Governor Cuomo issued multiple Executive Orders restricting gatherings and businesses.

30) On March 16, 2020, the Governor issued an Executive Order prohibiting gatherings in excess of 50 people. On-premises service of food and beverages in all bars and restaurants were indefinitely suspended, and gambling establishments, gyms, and movie theaters were indefinitely closed. Exh. J, Executive Order 202.3. All non-essential state and local workers were ordered to stay home, "except for those personnel essential to the . . . response to the COVID-19 emergency." Exh. K, Executive Order 202.4. All schools were closed. Id.

31) On March 18, 2020, all malls and places of public amusement closed. Exh. L, Executive Order 202.5.

32) On March 18, 2020, Governor Cuomo passed EO 202.6, which mandated remote working procedures, where possible, and reducing onsite workforce by 50 percent for nonessential businesses. Exh. M. EO 202.6 also created exceptions for the in-person work restriction for

essential businesses. Id.

33) On March 19, 2020, Governor Cuomo issued EO 202.7, which, among other directives, required non-essential employers to reduce the in-person workforce by 75 percent no later than March 21, 2020. Exh. N.

34) On March 20, 2020, Governor Cuomo passed EO 202.8, which among directives, mandated the reduction of onsite workforce for non-essential businesses by 100 percent no later than March 22, 2020 as well as the closure of barbershops, hair salons, tattoo or piercing parlors and related personal care services no later than March 21, 2020. Exh. O.

New York State on PAUSE

35) On March 20, 2020, the Governor announced the New York State on PAUSE initiative.

36) The 10-point New York State on PAUSE plan is as follows:

- All non-essential businesses statewide closed, effective March 22, 2020, at 8:00 p.m.;
- Non-essential gatherings of individuals of any size for any reason (e.g., parties, celebrations, and other social events) were canceled or postponed;
- Any concentration of individuals outside their home were limited to workers providing essential services and social distancing was imposed;
- When in public, individuals must practice social distancing of at least six feet from others;
- Businesses and entities that provide other essential services were ordered to implement rules that help facilitate social distancing of at least six feet;
- It limited outdoor recreational activities to non-contact activities and restricted activities where individuals could come in close contact with other people;

- It limited the use of public transportation to when absolutely necessary and potential exposure by spacing out at least six feet from other riders;
- Sick individuals were not permitted to leave their homes unless to receive medical care and only after a telehealth visit to determine if leaving the home is in the best interest of their health;
- Young people were ordered to practice social distancing and to avoid contact with vulnerable populations; and
- Use precautionary sanitizer practices, such as using isopropyl alcohol wipes.

37) On March 30, 2020, Governor Cuomo passed EO 202.13, which directed non-essential construction businesses to comply with in-person workforce reduction. The workforce closures were extended through April 29, 2020 pursuant to EO 202.14, then to May 15, 2020 pursuant to EO 202.18 and then to May 28, 2020 pursuant to 202.31. Exh. P.

APRIL, MAY, and JUNE 2020—New York Appears to Flatten the Curve

38) Before the imposition of the New York State on PAUSE initiative, the daily increase in the number of positive COVID-19 tests had been rising quickly. On March 19, the number of positive tests increased nearly 70%, from, 1,769 to 2,950. For the remainder of March and early April, the number of positive tests increased at an average rate of approximately 20% per day. On April 9, 2020, alone, over 10,000 people tested positive for COVID-19. Since April 9, 2020, the number of positive tests per day has declined steadily. On May 28, 2020, over 1,551 people tested positive for COVID-19. On June 29, 2020, 46,428 people were tested and only 319 tested positive—a positivity rate below .7 %.[5]

[5] Found at https://covid19tracker.health.ny.gov/views/NYS-COVID19-Tracker/NYSDOHCOVID-19Tracker-DailyTracker?%3Aembed=yes&%3Atoolbar=no&%3Atabs=n (last viewed October 18, 2020).

New York Forward

39) Over the course of May and June, as the State's infection and death rates began to stabilize and then decline, New York transitioned from the "New York on PAUSE" initiative to the "New York Forward" initiative, a phased plan to guide the reopening of non-essential businesses.

40) When New York transitioned from New York State on PAUSE to New York Forward, four phases were created to guide non-essential businesses and offices, as well as the essential businesses that remained open, on how to reopen. See https://forward.ny.gov/ny-forward. The "New York Forward" initiative was intended to begin a phased reopening of New York's economy in a targeted, measured way that would prevent any new spikes in COVID-19 cases. Through this carefully calibrated reopening plan, which has been data-driven and guided by public health experts, the State was able to keep the number of new infections and new deaths relatively flat at a time when cases were spiking throughout the rest of the nation.

41) Due to the success of the people of the State of New York at flattening the curve, all regions are in Phase Four. See https://forward.ny.gov/.

42) By following the guidelines and requirements, such as social distancing and wearing masks, New York has successfully reduced the spread of the virus. As testing throughout the State has increased, the number of positive cases has decreased. See https://forward.ny.gov/percentage-positive-results-region-dashboard. On August 2, 2020, the downward trend of positive cases continued, as 51,839 individuals were tested, of which 545 tested positive. Id.

43) The transmission rate, also known as the reproduction rate—which measures the

number of individuals infected on average by an infected individual—was at 3.59% on February 24, 2020. The rate was as low as .67% on April 17, 2020. The rate remained consistent between .67 and .73% until May when the NY Forward transition began. Since reopening, the rate has remained low but has begun inching up as the State progresses through the phases of reopening. On October 20, 2020, the transmission rate was at 0.99%. Anything above 1.0%, a critical indicator of stability, warrants close monitoring. See https://rt.live/.

The Pandemic Continues to Present a Grave Threat to the Health and Safety of New Yorkers

44) Despite the gains that New York has made, the pandemic is not over, as numbers have continued to increase. On July 29, 2020, WHO reported 16,558,289 individuals confirmed positive for COVID-19, and 656,093 confirmed COVID 19 deaths worldwide.[6] On July 29, 2020, the CDC reported that 4,339,997 individuals in the United States had tested positive for COVID-19, and 148,866 had died of COVID-19.[7]

45) COVID-19 cases and deaths continue to grow globally. On October 19, 2020, Johns Hopkins reported a total 40,122,835 individuals confirmed positive for COVID-19, and 1,114,857 confirmed COVID-19 deaths worldwide. See Fn. 1.

46) Increases in positive cases are currently sweeping through areas of the United States. On October 19, 2020, the CDC reported that 8,081,489 individuals in the United States had tested positive for COVID-19, and 218,511 had died of COVID-19. See Fn. 8.

47) The Governor and the Department of Health are constantly monitoring transmission

[6] Found at https://covid19.who.int/ (last viewed October 20, 2020).
[7] Found at https://www.cdc.gov/covid-data-tracker/index.html#trends (last viewed October 19, 2020).

and infection rates. See COVID-19 Early Warning Monitoring System Dashboard.[8]

New Spikes and Clusters

48) Since the beginning of September, the Department has seen the number of clusters spike in several areas around the State:

- Broome County
- Brooklyn
- Orange County
- Queens
- Rockland County

Exh. Q. See also Fn. 9 and Fn. 3.

49) For example, in Midwood Brooklyn where Petitioners' dealership is located, the positivity rate in the Brooklyn Red Zone the week of September 20 through September 26, 2020 was 7.67%, September 27 through October 3, 2020 the rate was 6.69%, and during the week of October 4 through October 10, 2020 , the rate was 5.86%. During those same time periods, the Statewide percent positivity rate, excluding Red Zones, was 0.97%, 1.25%, and 1.18%, respectively. These spikes necessitated immediate attention to contain the virus and mitigate the spread throughout the community.

50) According to the CDC, "[a] high percent positivity means that SARS-CoV-2, the virus that causes COVID-19, transmission is elevated in the jurisdiction and community mitigation measures are warranted to reduce transmission. A high percent positivity means there is a high rate of SARS-CoV-2 infections due to extensive transmission of the virus in the geographic area." Exh. R.

[8] Found at https://forward.ny.gov/early-warning-monitoring-dashboard (last viewed October 19, 2020).

51) The CDC also provides guidance for mitigation when there is a high positivity rate in an area. Exh. S. "The goal of community mitigation in areas with local COVID-19 transmission is to slow its spread and to protect all individuals, especially those at increased risk for severe illness, while minimizing the negative impacts of these strategies." Id.

52) The CDC describes layers and levels of mitigation required, based on the levels of transmission, which is what is being done in New York State through the creation of the three zones described below. See id., Table 1.

Cluster Action Initiative and COVID-19 Mapping

53) On October 6, 2020, the Governor announced a new Cluster Action Initiative ("Initiative") to address spikes in the number of covid positive tests in clusters found in Kings (Brooklyn), Queens, Broome, Orange, and Rockland Counties.[9] The objective is to "develop[ ] a science-based approach to attack these clusters and stop any further spread of the virus, including new rules and restrictions directly targeted to areas with the highest concentration of COVID cases and the surrounding communities. The new rules will be in effect for a minimum of 14 days." See Exh Q.

54) The purpose behind the Initiative is to "take dramatic action within the cluster" while also taking action in the surrounding area in order to contain and prevent the spread of the virus. Id. Precautionary actions are taken in the outlying communities. Id. The Initiative takes an aggressive and targeted approach for containing and controlling the spread of the virus from the immediate area where the cluster is located and to a larger region.

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[9] Cluster Action Initiative found at https://www.governor.ny.gov/news/governor-cuomo-announces-new-cluster-action-initiative (last visited October 20, 2020).

55) The Initiative divides clusters and the areas around them into three categories with successively higher restrictions within each one: Red Zone - cluster itself; Orange Zone - warning zone; and Yellow Zone - precautionary zone.

56) An area may be placed in a "Red Zone" if the following factors are met:

- The area is a defined geographic area (which may or may not align to geopolitical or other common geographic subdivisions, such as county, zip codes, or contiguous neighborhoods) has a 7-day rolling average positivity rate of 3% or higher for a sustained period of time (metrics adjusted for population size and population density);
- Positive cases reflect community spread and cannot be solely explained by a contained cluster in a single institution (e.g., nursing home, factory, college, etc.); and
- The Department, in consultation with the local departments of health, finds that it is in the best interest of public health for the area to be placed in Red Zone status.

57) Once an area is designated as a "Red Zone," the following steps are taken:

- The Department, in coordination with local health authorities, uses case incidence and mapping data to refine boundaries that balance epidemiological priorities with geographic realities;
- The Department, in coordination with local health authorities, uses case incidence and mapping data to refine and establish boundaries for "buffer zones" around the Red Closure Zone to ensure spread from the closure zone does not broaden into the wider community. In densely populated urban areas, two buffer zones – an Orange Warning Zone and a Yellow Precautionary Zone – may be required; and
- The Department issues guidance specific to each warning zone and the status of activities within the zone (i.e., mass gatherings, businesses, schools, etc.).

58) There is no specific percentage or threshold to determine when an area should be

designated as an Orange Zone or a Yellow Zone, as it is a nuanced process that takes multiple factors into account and not solely the positivity percentage. It is important, for instance, to consider the population density of the area. The Department analyzes the number of cases within the Orange and Yellow Zones to determine the rates positive cases. The positivity percentages within those zones indicate the level of spread beyond the cluster and require some level of mitigation to prevent any further spread of the virus.

59) The Orange Zone serves as a buffer to the Red Zone and is generally a five block or quarter mile boundary around the Red Zone tracked by streets. The goal of having such an area, which is given more scrutiny, is to prevent the cluster zone from expanding further and keeping it contained.

60) The Yellow Zone serves as a buffer to the Orange Zone with the same goal of containing the virus and not allowing the cluster to expand.

61) After 14 days, the Department, in coordination with local health authorities and in consultation with global health experts, determines whether data sufficiently demonstrate that the area has successfully reduced viral spread to a level able to be contained given testing, contact tracing, and other health system metrics. Based on this data and expert advisement, the Department decides whether the Red Closure Zone will be extended, modified, or terminated altogether.

62) Once a Red Zone – and corresponding Orange and Yellow Zones – is established, certain restrictions apply within each Zone.

63) In the most severely impacted area, the "Red Zone",

Non-essential gatherings of any size shall be postponed or

> cancelled; all non-essential businesses, as determined by the Empire State Development Corporation based upon published guidance, shall reduce in-person workforce by 100%; houses of worship shall be subject to a capacity limit of 25% of maximum occupancy or 10 people, whichever is fewer; any restaurant or tavern shall cease serving patrons food or beverage on-premises and may be open for takeout or delivery only; and the local Department of Health shall direct closure of all schools for in-person instruction, except as otherwise provided in Executive Order.

See Exh. T.

64) The "Orange Zone" is a moderately severe location and, thus,

> Non-essential gatherings shall be limited to 10 people; certain non-essential businesses, for which there is a higher risk associated with the transmission of the COVID-19 virus, including gyms, fitness centers or classes, barbers, hair salons, spas, tattoo or piercing parlors, nail technicians and nail salons, cosmetologists, estheticians, the provision of laser hair removal and electrolysis, and all other personal care services shall reduce in-person workforce by 100%; houses of worship shall be subject to a maximum capacity limit of the lesser of 33% of maximum occupancy or 25 people, whichever is fewer; any restaurant or tavern shall cease serving patrons food or beverage inside on-premises but may provide outdoor service, and may be open for takeout or delivery, provided however, any one seated group or party shall not exceed 4 people; and the local Department of Health shall direct closure of all schools for in-person instruction, except as otherwise provided in Executive Order.

Id.

65) The precautionary or "Yellow Zone" requires that

> Non-essential gatherings shall be limited to no more than 25 people; houses of worship shall be subject to a capacity limit of 50% of its maximum occupancy and shall adhere to Department of Health guidance; any restaurant or tavern must limit any one seated group or party size to 4 people; and the Department of Health shall issue guidance by October 9, 2020 regarding mandatory testing of students and school personnel, and schools shall adhere to such guidance.

Id.

66) In areas experiencing a higher positivity rate, which have been designated as Red

Zones under 202.68, the risk of transmission and spread is higher than areas with a lower positivity rate.

67) The Zones are representative of the prior reopening phases, but now on a smaller scale to target clusters.

68) It is important to place restrictions on the three Zones as well as reduce those restrictions in increments, as was done in the NY Forward Plan and Phases.

69) By reducing the number of people interacting in areas that are experiencing COVID-19 spikes, the transmission rate can be reduced. Restricting the activities of non-essential businesses is helpful in achieving this purpose and to prevent a deadly second wave of the pandemic from afflicting the State and requiring additional extensive shutdowns of schools and businesses.

70) Based on New York's Cluster Action Initiative Guidance under EO 202.68 car dealerships are an essential business. Plaintiffs are not closed. The guidance permits "auto repair and maintenance and automotive sales conducted remotely or electronically, with in-person vehicle showing, return, and delivery by appointment only." Exh. U.

71) All car dealerships in the Red Zone are restricted in the exact same way as Plaintiffs, regardless of how many cases are directly linked to their business (even none), with the goal of aggressively containing the virus and preventing spread by reducing density.

72) Plaintiffs assertion that they are "prohibited from operating their dealerships, while their identically situated competitors are freely able to sell vehicles in person" is an invalid comparison and factually untrue. See Complaint, ¶¶ 60 and 61. Plaintiffs may conduct in-person sales by appointment, they just cannot permit people to walk in. See Exh. U. This is

appropriate for controlling the density of people at the dealership at any given time which is beneficial for controlling the spread of the virus.

73) Dealerships outside the Red Zone or completely outside the three Zones are not appropriate comparators since the restrictions in each zone are based on the positivity rate in a geographic area. See infra ¶ 92.

74) Car dealerships, like other businesses, are not immune from COVID-19 infection cases. As recently as October 9, 2020, the Albany County Department of Health has been investigating an infection cluster at a car dealership. Exh. V. All car dealerships in a Red Zone are subject to the same restrictions, with the goal of aggressively containing the virus within the zone and preventing spread outward by reducing density or the amount of people in a particular area.

75) The Department analyzes the number of positive cases and works to prevent a larger outbreak by creating the tightest targeted restrictions dependent on the rates of positivity in an area.

Mapping Data

76) The creation of the cluster zones is map-based and formulated from data submitted to the Department and analyzed by Department staff.

77) The map of the zones is drawn from data submitted to the State's Electronic Clinical Laboratory Reporting System ("ECLRS") based on areas of concern. Laboratories in New York State use this system for secure and rapid transmission of reportable disease information to the Department, county health departments, and the New York City Department of Health and Mental Hygiene ("NYCDOHMH").

78) The Department analyzes the data submitted to ECLRS and determines the positivity rates which in turn indicate areas of concern.

79) A laboratory is required to report all COVID-19 tests results to the State and uploads data files related to these tests. This data is then analyzed and used to generate a map indicating the location of these cases (COVID-19 positive test results). The cases are represented as dots on a map and indicate areas with high positivity percentages. My team works with members of the Task Force to look first at the zip codes with the highest positivity rates and then break that down further based on individual addresses using the data pulled from ECLRS.

80) The Red Zone contains the highest level and concentration of positive cases, which is the cluster itself and is created by analyzing the mapping of the positivity rates and using streets as boundaries.

81) The Red Zone is created by pulling data from ECLRS and analyzing it to map out cases as dots. Where the concentration of dots indicate a high level of virus in an area, this in turn delineates the boundaries of the Red Zone. When mapping the positive cases and creating the zones, we do not analyze the businesses or entities located therein, but rather the number and grouping of positive cases. Our analysis is based on the data and not who is located in a given zone – each non-essential business, school (religious or otherwise), yeshiva, church, synagogue, or car dealership is subject to comparable restrictions.

Positivity Rates

82) The positivity rates are pulled daily from ECLRS, are mapped out, and are analyzed to determine if a particular cluster is improving or getting worse. The positivity rates in the combined Red Zones as of October 17, 2020 is 3.19% – a gradual reduction from the 7.9%

positivity rate during the week of September 20 through September 26. While this indicates that the targeted restrictions are having the desired effect to mitigate and control the spread of the virus, this is still approximately 3 times greater than the approximate overall State positivity rate of 1%, which is still highly concerning.

83) Petitioners' dealership is located in the Brooklyn Red Zone. A review of the data and maps in Petitioners' area indicates that there are COVID-19 positive cases in the immediate vicinity of the dealership. Exh. W.

84) The number of cases in Petitioners' vicinity has grown since September 6, 2020. Exh. X. The week of September 6, 2020 there were 228 cases in the Brooklyn cluster Zones. Id. During the week of September 29, 2020, the number of positive cases grew to 1,156. Id. There were 1,333 positive cases the week of October 6-16, 2020. Id. See also Exh. Y. These spikes signaled that immediate attention was needed to contain the virus and mitigate the spread throughout the community.

85) The ECLRS data indicates that between September 1, 2020 and October 8, 2020, there have been 10 positive COVID-19 cases within a ⅛ mile buffer zone around Plaintiffs' dealership. There have been 56 cases within a ¼ mile buffer zone and 323 cases within a ½ mile buffer zone.

Modification of the Zones

86) The Department and the Task Force are continually monitoring and testing the data related to transmission, including the positivity rates and population density, to inform decisions on zone designation and possible modification.

87) Any re-evaluation for a reduction in restrictions would not occur before 14 days since that is the incubation period for the virus. This data and analysis are provided to the Governor and his team on a daily basis, including the COVID-19 Task Force.

88) Any reduction or increase in restrictions will occur based on the analysis of all of the available data. While we do not speculate on what future actions will be taken since this is an ever-evolving process, driven by the positivity rates and trends over time, the goal is clearly to mitigate community spread and continue the phased reopening throughout the state.

89) Many different actions can be taken based on an analysis of the data and due to its evolving nature. This is a highly calibrated process to ensure that the most precise restrictions are in place. The Department receives new data throughout the day creating fluctuations in numbers and rates. The data is continually reassessed to fine tune the statistics to ensure that we, the Task Force, and the Governor have the most current data available to indicate progress, or lack thereof, in the zones.

90) Where the data shows sustained decrease in community transmission in the cluster, the Department, the Task Force, and the Governor assess the change in transmission rates and all available relevant information related thereto to determine whether zone modification is warranted and would protect the public health of New Yorkers.

91) With respect to any easing of restrictions in the Red Zone, the Department, the Governor's team, and the Task Force will continue to monitor and assess the current decreasing trend in that zone to ensure that it demonstrates a sustained downward trend. Upon this review, if the operation has been successful, the designation of a Red Zone may be modified or lifted altogether.

Responsible Parties

92) For industries where people may gather, guidelines are directed at a responsible party – the individual who will ensure that the guidelines and EOs are being adhered to at the gatherings. See https://forward.ny.gov/statewide-guidelines. It is the responsible party for any gathering who must ensure that masks are worn, soap and water and/or hand sanitizer are available, proper distances are maintained, and any necessary markings are made on the floor or ground to show proper distancing.

93) It is important for responsible parties to follow State and local guidance to prevent transmission of COVID-19.

94) True and accurate copies of the following documents are attached hereto:

Exhibit A: WHO Situation Report 1.

Exhibit B: WHO Situation Report 3.

Exhibit C: A true and accurate copy of the Statement on the Second Meeting of the International Health Regulations (2005) Emergency Committee Regarding the Outbreak of Novel Coronavirus (2019-nCoV) (Jan 30, 2020).

Exhibit D: WHO Declares Global Pandemic.

Exhibit E: A true and accurate copy of the National Emergency Declaration signed by President Trump on March 13, 2020.

Exhibit F: WHO Article: Transmission of SARS-CoV-2: implications for infection prevention precautions

Exhibit G: CDC: Cleaning and Disinfection for Households.

Exhibit H: CDC: Social Distancing.

Exhibit I: Governor Cuomo's Executive Order 202.

Exhibit J: Governor Cuomo's Executive Order 202.3.

Exhibit K: Governor Cuomo's Executive Order 202.4.

Exhibit L: Governor Cuomo's Executive Order 202.5.

Exhibit M: Governor Cuomo's Executive Order 202.6.

Exhibit N: Governor Cuomo's Executive Order 202.7.

Exhibit O: Governor Cuomo's Executive Order 202.8.

Exhibit P: Governor Cuomo's Executive Order 202.31.

Exhibit Q: Governor Cuomo's Announcement of Cluster Initiative.

Exhibit R: CDC Frequently Asked Questions: Calculating Severe Acute Respiratory Syndrome Coronavirus 2 (SARS-CoV-2) RT-PCR Laboratory Test Percent Positivity.

Exhibit S: CDC Implementation of Mitigation Strategies for Communities.

Exhibit T: Governor Cuomo's Executive Order 202.68.

Exhibit U: ESD Cluster Action Initiative Guidance.

Exhibit V: Article: COVID infection cluster reported at Albany auto dealership.

Exhibit W: Brooklyn Map – dealership area indicated.

Exhibit X: Brooklyn Map – Cases over time

Exhibit Y: Brooklyn Map – recent only

Dated: October 20, 2020
Albany, New York

Howard A. Zucker, M.D., J.D.